Petition

81-211

No. 81-

Office-Supreme Court, U.S.
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AUG 3 1981
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1981

THE PEOPLE OF THE STATE OF MICHIGAN,
PETITIONER,

VS.

MAURICE HURD,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN

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QUESTION PRESENTED

DID THE MICHIGAN COURT OF APPEALS ERR IN HOLDING THAT UNDER THE FIFTH AMENDMENT "A DEFENDANT'S CONSTITUTIONAL RIGHT TO REMAIN SILENT IS CONSTANT; THERE IS NO DISTINCTION BETWEEN SILENCE PRIOR TO, AT THE TIME OF, OR FOLLOWING ARREST?"

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No. 81-

In the Supreme Court of the United States

OCTOBER TERM, 1981

THE PEOPLE OF THE STATE OF MICHIGAN,
PETITIONER,

VS.

MAURICE HURD,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN

NOW COME the People of the State of Michigan, by WILLIAM L. CAHALAN, Prosecuting Attorney for the County of Wayne, EDWARD REILLY WILSON, Principal Attorney, Appeals, and TIMOTHY A. BAUGHMAN, Assistant Prosecuting Attorney and pray that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of Michigan entered in the above-entitled cause on December 15, 1980, rehearing denied on February 10, 1981, and leave to appeal denied by the Michigan Supreme Court on June 8, 1981, (three justices dissenting).

OPINIONS BELOW

The opinion of the Michigan Court of Appeals is reported at 102 Mich App 424, ____ NW2d ____ (1980) and is appended at Appendix A. The order denying rehearing is appended as Appendix B. The order of the Michigan Supreme Court denying leave to appeal is appended as Appendix C.

STATEMENT OF JURISDICTION

The opinion of the Michigan Court of Appeals was issued December 15, 1980, and rehearing denied February 10, 1981. The Michigan Supreme Court denied leave to appeal on June 8, 1981. The jurisdiction of this Court is invoked under 28 USC 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person . . . shall be compelled in any criminal case to be a witness against himself. . . .

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF FACTS

On direct examination, Respondent testified that the complainant had telephoned him about three days after March 28, 1978. Defendant told complainant that he had heard that the police were looking for him on a rape charge and that she should keep defendant's name "out of it." On cross-examination, the following dialogue ensued:

Q: By the way, you didn't go to the police when you heard that they were looking for you?

A: No.

Q: I mean you hadn't been involved in this but you heard that they were looking for you for something you hadn't done but you didn't go to them about it?

A: Well, because I thought it was a rumor running around.

Defense counsel did not object to the prosecutor's questions.

The Michigan Court of Appeals reversed, finding that this questioning violated defendant's Fifth Amendment right:

> A defendant's constitutional right to remain silent is constant; there is no distinction between silence prior to, at the time of, or following arrest.

The Michigan Supreme Court denied leave to appeal, three justices dissenting.

REASONS FOR GRANTING THE WRIT

The Michigan Court of Appeals reversed finding a violation of defendant's Fifth Amendment right against *compulsory* self-incrimination (there is no "right to silence"), stating that "a defendant's constitutional right to remain silent is cons-

tant; there is no distinction between silence prior to, at the time of, or following arrest." This statement is incorrect.

In *Jenkins* v *Anderson*, , 65 L Ed 2d 86 (1980, this Court held that there *is* a difference between pre-arrest and post-arrest silence. Comment on the former is not a penalty for exercise of the right against compulsory self-incrimination because that right has not been exercised. As cogently stated by Justice Stevens concurring:

> . . . the question is whether petitioner was in a position to have his testimony compelled and then asserted his privilege, not simply whether he was silent. A different view ignores the clear words of the Fifth Amendment.

The present case is legally and factually consistent with *Jenkins,* where defendant was questioned regarding his failure to wait for the police and tell his self-defense story after the killing. Here, defendant was questioned regarding his failure to contact the police after he heard they were looking for him. No principled distinction can be drawn between this situation and that in *Jenkins.*

Any argument that the instant case was decided on state grounds would be disingenuous. The Michigan Court of Appeals relied on the doctrine announced in *People* v *Bobo*, , 390 Mich 355; 212 NW2d 190 (1970), where the Michigan Supreme Court held that "whether his (defendant's) silence was prior to or at the time of arrest makes little difference — the defendant's *Fifth Amendment* right to silence is constant." (emphasis added). 390 Mich at 360. The court also overruled an earlier case on adoptive admissions as "wholly at odds with the law defining our rights under the Fifth Amendment. . . ." 390 Mich at 362. Because such holdings are at odds with this Court's holding in *Jenkins,* plenary review should be granted.

CONCLUSION

It is respectfully submitted that the decision of the Michigan Court of Appeals conflicts with a decision of this Court so that plenary review should be granted.

Respectfully submitted,

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Prosecuting Attorney

EDWARD REILLY WILSON (P-22400)
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Dated: July 13, 1981

APPENDIX ON APPEAL.

DECISION OF MICHIGAN COURT OF APPEALS
102 Mich App 424
(Dated December 15, 1980)

PEOPLE v HURD

Docket No. 45215. Submitted October 1, 1980, at Detroit. — Decided December 15, 1980.

Maurice Hurd was convicted of first-degree criminal sexual conduct, Wayne Circuit Court, Horace W. Gilmore, J. He appealed alleging that the prosecutor's opening statement was not supported by the proofs presented during trial, and that the trial court erred in excusing a juror outside defendant's presence, in permitting direct examination regarding his prior conviction record, in allowing an inference to be drawn from his pre-arrest actions, and in instructing the jury regarding reasonable doubt. *Held:*

1. The admission of references in the prosecutor's opening statement which were not later supported by proofs offered does not require reversal. The opening statement was made in good faith under circumstances in which defendant did not object.

2. The trial court did not err in excusing a juror in defendant's absence. Defendant was not affirmatively barred from being present, his absence being attributable to his own actions. Defendant's attorney did not move to delay discussion relative to the dismissal, nor did he object to the proceedings following defendant's arrival. The decision was reasonable and was a proper exercise of the court's discretionary power.

3. Defendant's counsel raised the issue of prior convictions during direct examination of defendant, not to impeach the defendant but to establish that he had never been convicted of a felony. The prosecutor never referred to the subject before or after it was raised. Any prejudice which the dialogue occasioned was minimal and does not require granting a new trial.

4. The trial court erred in permitting the prosecution to imply that defendant's silence when questioned by police officers amounted to an admission of guilt, thereby violating his right to remain silent.

5. The trial court's instruction to the jury, while not constituting error, comes dangerously close to precluding consideration of the lack, want, or insufficiency of the evidence, and, on remand, the trial court should note that a reasonable doubt may arise under such circumstances.

Reversed and remanded.

1. CRIMINAL LAW — PROSECUTING ATTORNEYS — GOOD FAITH ASSERTIONS — PROOFS — APPEAL.

A reference by a prosecutor in his opening statement that something will be proved which is not later proved is not grounds for reversal on appeal if the statement is made in good faith and under circumstances where the defendant did not object.

2. CRIMINAL LAW — IN-CHAMBERS QUESTIONING OF JURORS — ERROR — APPEAL.

The standard by which to determine whether a trial court, by questioning jurors in chambers in a defendant's absence, committed error requiring reversal on appeal is whether there is any reasonable possibility of prejudice.

3. Criminal Law — Dismissal of Jurors — Judicial Discretion.

A trial judge in a criminal case may excuse a juror as an exercise of his discretionary power.

4. Appeal — Failure to Object — Manifest Injustice.

Alleged errors in the admission of testimony during cross-examination by a prosecutor not objected to during trial are not preserved for appeal absent a finding of manifest injustice.

5. Criminal Law — Tacit Admission Rule — Applicability — Rules of Evidence — Constitutional Law.

The tacit admission rule which permits the introduction into evidence of adoptive admission is not applicable to criminal cases because if the rule were applied it would be violative of a defendant's Fifth Amendment right against self-incrimination (MRE 801[d][2][B]).

6. Criminal Law — Right to Remain Silent — Constitutional Law.

A nonutterance is not a statement, and the fact that a witness did not make a statement may be shown only to contradict his assertion that he did.

7. Criminal Law — Right to Remain Silent — Arrest.

A defendant's right to remain silent is constant; there is no distinction between silence prior to, at the time of, or following arrest.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Gary Dettloff,* Assistant Prosecuting Attorney, for the people.

Chari Grove, Assistant State Appellate Defender, for defendant on appeal.

Before: J. H. GILLIS, P.J., and BASHARA and CYNAR, JJ.

J.H. GILLIS, P.J. Defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b(1)(d)(ii); MSA 28.788(2)(1)(d)(ii). Sentenced to five to ten years in prison, he appeals as of right.

At trial, the prosecutor's opening statement included a comment that the proofs would show that, after the sexual assault, defendant "told one of the men to go downstairs and to heat up a coat hanger", apparently intending to insert it in complainant's vagina. Although the proofs did establish that, on March 28, 1978, defendant engaged in sexual penetration with the complainant, aided or abetted by two other persons (Spanky and Kiyo) under circumstances in which force or coercion was used, the complainant testified that Spanky approached her with the hanger, that she pulled defendant in front of her, and that Kiyo told Spanky to put the hanger down.

Defendant asserts error because the proofs did not support the prosecutor's opening statement. We find no error, primarily because the complainant's statement to the police which was read into the record during trial indicated that it was defendant who got the hanger, heated it on the stove, and then gave it to Spanky. The prosecutor's opening statement was made in good faith under circumstances where defendant did not object. Reversal is not required on this ground. *People* v *Moncure*, 94 Mich App 252, 261; 288 NW2d 675 (1979), *People* v *Joshua*, 32 Mich App 581, 586; 189 NW2d 105 (1971), *lv den* 386 Mich 758 (1971), *cert den* 409 US 853; 93 S Ct 183; 34 L Ed 2d 96 (1972).

On the second day of trial, defendant was at least 25 minutes late for trial. While awaiting his arrival, the trial judge noted that one juror[1] had advised the judge that morning that his (the juror's) son had been arrested for a larceny offense during the weekend. The attorneys joined the judge and the juror in chambers and questioned the juror about his ability to sit on the jury in light of his son's arrest. When they reentered the courtroom, the judge noted on the record that the juror had stated that he knew how defendant's father must have felt while his son was on trial. The defense attorney did not personally desire to excuse the juror, but he stated that he had no objection to the prosecutor's request in that regard. Accordingly, the juror was excused in defendant's absence.

Defendant now claims that his constitutional right to be present at all critical stages of his prosecution was violated when the juror was excused outside defendant's presence.

In *People* v *Morgan*, 50 Mich App 288; 213 NW2d 276 (1973), the jurors were questioned about their awareness of media publicity while in chambers in defendant's absence. Defendant alleged a right to new trial on this basis, and this Court agreed. The Michigan Supreme Court reversed, however, 400 Mich 527, 536; 255 NW2d 603 (1977), *cert den* 434 US 967; 98 S Ct 511; 54 L Ed 2d 454 (1978) *reh den* 434 US 1041; 98 S Ct 783; 54 L Ed 2d 791 (1978), adopting the following test for analyzing the issue from *Wade* v *United States*, 142 US App DC 356, 360; 441 F2d 1046, 1050 (1971):

" 'It is possible that defendant's absence made no difference in the result reached. The standard by which to determine whether reversible error occurred [is] * * * whether there is "any reasonable possibility of prejudice" '."

---

[1] Fourteen jurors were originally impaneled.

The record does not reveal any reasonable possibility of prejudice in the instant case. Although defendant's delayed arrival in court may have been entirely reasonable, the fact remains that he was not present during the in-court discussion whether to excuse the juror because he was late, not because he was affirmatively barred from being present. Moreover, his attorney did not move to delay the discussion until defendant arrived or voice any objection to the proceedings on defendant's behalf after defendant did arrive in court. Finally, the decision to excuse the juror was reasonable, and, in any event, the judge could have excused the juror even in defendant's presence as an exercise of his discretionary power. *People* v *Bell*, 74 Mich App 270, 274; 253 NW2d 726 (1977), MCL 768.18; MSA 28.1041.

On direct examination, defendant was asked whether he had ever been arrested and convicted of a felony. Defendant's answer was that "[he] had a record before but it was dropped, the charges were dropped". Further, he answered in the negative the question whether he had ever been found guilty of any felony.

Defendant's testimony does not require the granting of a new trial. Defense counsel's question was not asked in order to impeach defendant, but to establish that he had never been convicted of a felony. Any prejudice which flowed from this dialogue was minimal and cannot be charged in any event to the prosecutor, who never referred to the subject before or after it was raised by defendant. *People* v *Johnson*, 46 Mich App 212, 219; 207 NW2d 914 (1973), *People* v *Bearden*, 29 Mich App 416, 418; 185 NW2d 438 (1971) *lv den* 384 Mich 832 (1971).

The most serious question raised on the appeal of this case is whether defendant's constitutional right to remain silent was violated during trial. On direct examination, defendant

testified that the complainant had telephoned him about three days after March 28, 1978. Defendant told complainant that he had heard that the police were looking for him on a rape charge and that she should keep defendant's name "out of it". On cross-examination, the following dialogue ensued:

"*Q.* By the way, you didn't go to the police when you heard that they were looking for you?

"*A.* No.

"*Q.* I mean you hadn't been involved in this but you heard that they were looking for you for something you hadn't done but you didn't go to them to talk to them about it?

"*A.* Well, because I thought it was a rumor running around."

Defense counsel did not object to the prosecutor's questions, so the error, if any, is waived absent a finding of manifest injustice. *People* v *Stinson*, 88 Mich App 672, 674; 278 NW2d 715 (1979).

The error claimed by defendant involves the tacit admission rule which permits the introduction into evidence of adoptive admissions. The rule is not applicable to criminal cases in Michigan. MRE 801(d)(2)(B), *People* v *Bigge*, 288 Mich 417, 421; 285 NW 5 (1939), *People* v *Washington*, 100 Mich App 628, 630; — NW2d — (1980). If the rule were applied in criminal cases, it would violate the Fifth Amendment right against self-incrimination. In *Bigge,* defendant was silent in the face of a statement that he was "guilty as hell". In *Washington,* defendant remained silent " in the face of an accusatory statement".

In *People* v *Bobo*, 390 Mich 355; 212 NW2d 190 (1973), defendant was asked by the prosecutor whether he had advised the police that, just before his arrest, two men ran past him.

Although the implication inherent in the question was that defendant did not offer an available "defense" to the arresting officers' suspicions, the function of the question was to show defendant's silence in the face of an accusatory action (arrest). The Court reversed defendant's conviction:

"We will not condone conduct which directly or indirectly restricts the exercise of the constitutional right to remain silent in the face of accusation. 'Nonutterances' are not statements. The fact that a witness did not make a statement may be shown only to contradict his assertion that he did." 390 Mich 355, 359.

See, also, *People* v *Wade*, 93 Mich App 735, 736-740; 287 NW2d 368 (1979), where defendant hid in her basement until the police returned to her home a second time. Recognizing that "[a] defendant's constitutional right to remain silent is constant; there is no distinction between silence prior to, at the time of, or following arrest", the Court affirmed because the trial court gave a cautionary instruction which "alleviated any possible prejudice to the defendant".

Here, no cautionary instruction was requested or given. Further, the jury was confronted with the testimony of two witnesses, the complainant and the defendant, and asked to balance their credibility in a search for the truth. Although the prosecutor did not refer to defendant's answers to his questions during his closing argument, the implication was clearly given during the testimony that, if defendant was innocent, he would have gone to the police to counter the rumor that they were looking for him on a rape charge. Because the entire case hinged on the credibility of defendant and the complainant, we cannot say that, in a trial free of the error, one juror might not have voted to acquit. *People* v *Christensen*, 64 Mich App 23, 32-33; 235 NW2d 50 (1975), *lv den* 397 Mich 839 (1976).

The final question for our consideration is whether error resulted when the trial court instructed the jury as follows:

"In considering the case, *you are not to go beyond the evidence to hunt for doubts nor should you entertain such doubts as are merely fanciful or based on groundless conjecture.* A doubt to justify an acquittal must be a reasonable doubt. A reasonable doubt is a fair doubt growing out of the testimony of the case. It is not a mere imaginary, captious *[sic]* or possible doubt." (Emphasis supplied.)

The emphasized portion of the instruction was not as carefully worded as it might have been. For purposes of remand, we note that "[a] reasonable doubt may arise 'from the lack, want or insufficiency of the evidence for the State', * * *". *People* v *Davies*, 34 Mich App 19, 26; 190 NW2d 694 (1971), *lv den* 385 Mich 773 (1971). Hence, to say that the jury should not go beyond the evidence comes dangerously close to precluding consideration of the "lack, want or insufficiency of the evidence".

Reversed and remanded for a new trial.

ORDER OF MICHIGAN COURT OF APPEALS
(Entered January 30, 1981)

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Detroit, on the thirtieth day of January in the year of our Lord one thousand nine hundred and eighty-one.

Present the Honorable
JOHN H. GILLIS
Presiding Judge
GEORGE N. BASHARA, JR.
WALTER P. CYNAR
Judges

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

vs.

MAURICE HURD,
Defendant-Appellee.

Docket # 45215
L.C. #
78-826-567-FY

In this cause a motion for leave to file delayed application for rehearing and an application for rehearing are filed by plaintiff-appellee, and an answer in opposition thereto having been filed, and due consideration thereof having been had by the Court,

IT IS ORDERED that the motion for leave to file delayed application for rehearing be, and the same is hereby, GRANTED.

IT IS FURTHER ORDERED that the delayed application for rehearing be, and the same is hereby, DENIED for lack of merit in the grounds presented.

STATE OF MICHIGAN — ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 10th day of February in the year of our Lord one thousand nine hundred and eighty-one.

(s) Ronald L. Dzierbicki
Clerk

ORDER OF MICHIGAN SUPREME COURT
(Entered June 8, 1981)

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room in the City of Lansing, on the 8th day of June in the year of our Lord one thousand nine hundred and eighty one.

Present the Honorable
MARY S. COLEMAN,
Chief Justice

CR 33-38

THOMAS GILES KAVANAGH,
G. MENNEN WILLIAMS,
CHARLES L. LEVIN,
JOHN W. FITZGERALD,
JAMES L. RYAN,
BLAIR MOODY, JR.,
Associate Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

vs.

SC: 66721
COA: 45215
LC: 78-826-567 FY

MAURICE HURD,
Defendant-Appellee.

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because the Court is not persuaded that the question presented should be reviewed by this Court.

Coleman, C.J.; Moody and Ryan, JJ., would grant leave to appeal.

STATE OF MICHIGAN — ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 8th day of June in the year of our Lord one thousand nine hundred and eighty one.

(Seal)

/s/ Corbin R. Davis
Deputy Clerk

Opposition

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I N T H E

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-211

STATE OF MICHIGAN,

Petitioner,

-vs-

MAURICE HURD,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

PROOF OF SERVICE

AFFIDAVIT

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(8-28-81)

9

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

STATE OF MICHIGAN,

Petitioner,

-vs-

MAURICE HURD,

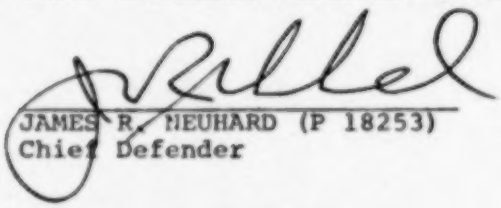
Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

NOW COMES MAURICE HURD, RESPONDENT, in the above captioned cause, by his attorneys, the State Appellate Defender Office, by Chari Grove and requests this Honorable Court to grant leave to file the attached Brief in Opposition to a Petition for Writ of Certiorari to the Michigan Court of Appeals (without prepayment of costs) and to proceed in forma pauperis pursuant to Rule 46.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

BY: 

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Chief Defender

BY: Chari Grove

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1200 Sixth Avenue
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Detroit, Michigan 48226
256-2814

Dated: August 28, 1981

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

No.

THE PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

-vs-

MAURICE HURD,

Respondent.

AFFIDAVIT TO ACCOMPANY MOTION
FOR LEAVE TO PROCEED IN FORMA PAUPERIS

STATE OF MICHIGAN)
) SS
COUNTY OF IONIA)

I, MAURICE HURD, being first duly sworn according to law, depose and say in support ofmy motion for leave to proceed in forma pauperis, without being required to prepay costs or fees:

1. I am the Respondent in the above captioned cause; I am a citizen of the United States of America.

2. Because of my poverty I am unable to pay the costs of defending myself in this cause in this Honorable Court; I am unable to give security for the same.

3. I further sear that the responses I have made to the question and instrcutions below relating to my ability to pay the cost of responding to the petition for writ of certiorari are true:

A. I am presently unemployed. I was last employed by Chrysler Corporation, Warren Truck Assembly in 1978, before my trial. My average weekly earnings were $250.00.

B. I have not been employed since 1978; I have received no income in the past twelve months from any business, profession, or other form of self-employment, or in the form of rent payments, interest, dividends or other sources. I am presently incarcerated at the Ionnia Reformatory, Ionia, Michigan.

C. I do not own any cash or checking or savings account.

D. I do not own any real estate, stocks, bonds, notes, automobiles or other valuable property.

4. I believe that I am entitled to the benefit of the judgment of the United States Supreme Court.

5. I have been found indigent for purposes of: (1) trial in the Wayne County Circuit Court and (2) appeals to the Michigan Court of Appeals and to the Michigan Supreme Court. On all appeals to date I have been represented by the STATE APPELLATE DEFENDER OFFICE, 1200 Sixth Avenue, Third Floor - North Tower, Detroit, Michigan, 48226.

FURTHER, I SAY NOT.

Maurice D. Hurd
MAURICE HURD

Subscribed and sworn to before me
this 21 day of August, 1981.

William P. Sager

Notary Public, County of _____
My Commission Expires:
_____

WILLIAM P. SAGER
Notary Public, Muskegon Co. Mich.
My Commission Expires Sept. 11, 1984

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

No. 81-

STATE OF MICHIGAN,

Petitioner,

-vs-

MAURICE HURD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS

OF THE STATE OF MICHIGAN

RESPONDENT'S BRIEF IN OPPOSITION

STATE APPELLATE DEFENDER OFFICE

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

No. 81-

STATE OF MICHIGAN,

Petitioner,

-vs-

MAURICE HURD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent Maurice Hurd respectfully requests this Honorable Court to deny the petition for writ of certiorari, seeking review of the opinion issued December 15, 1980, in the case of People v Hurd, 102 Mich App 424 (1980), rehearing denied on February 10, 1981, and leave to appeal denied by the Michigan Supreme Court on June 8, 1981.

OPINIONS BELOW

Respondent accepts as correct the opinion and order contained in Petitioner's appendix.

COUNTERSTATEMENT OF FACTS

The complaining witness in this criminal sexual conduct trial, Debbie Jordan, testified that she accused Defendant Maurice Hurd, nick-named "Reesie", the day after the alleged crime (T. 75, 102-104, 114). She told her mother and her aunt and then the police, naming "Spanky", "Kiyo" and "Reesie" as her attackers (T. 102-103). Ms. Jordan gave her aunt, but not the police, "Reesie's" telephone number (T. 102, 115). Defendant was not arrested, however, until three or four months later (T. 128). Evidence was presented by Defendant's sister that Ms. Jordan had been to his residence, looking for him (T. 171), prior to the alleged rape.

Defendant admitted being with Ms. Jordan, Spanky and Kiyo on the evening in question, but denied having touched the complainant. He testified that he and Kiyo left Spanky and Debbie in Spanky's house. They were having an argument, and Mr. Hurd and Kiyo thought it was none of their business, so they left and did not return (T. 140).

On cross-examination, the prosecutor asked Mr. Hurd when he first heard the police were looking for him as a suspect "on this rape thing." (T. 162). Defendant responded that he found out the week-end immediately following the alleged incident (T. 162). The following questions were then put to Defendant concerning his silence in the face of Debbie Jordan's accusation:

> "Q [By Prosecutor Gutter] Heard that it was Debbie that made the accusation?
>
> A They said Miss Jordan.
>
> Q And so you didn't call her but at some point she called you?
>
> A Right.
>
> Q By the way, you didn't go to the police when you heard that they were looking for you?
>
> A No.
>
> Q I mean you hadn't been involved in this but you heard that they were looking for you for something you hadn't done but you didn't go to them to talk to them about it?

A Well, because I thought it was a rumor running around.

Q And you didn't call Debbie about it either?

A No." (T. 162-163) (Emphasis added).

The jury found Maurice Hurd guilty of criminal sexual conduct in the first degree. He was sentenced to 5 to 10 years in prison. The Michigan Court of Appeals reversed his convicted and granted him a new trial. The People applied for rehearing in the Michigan Court of Appeals, applied for leave to appeal in the Michigan Supreme Court, and now petitions this Court for a Writ of Certiorari.

SUMMARY OF ARGUMENT

Petitioner seeks review of the decision of the Michigan Court of Appeals, alleging that it conflicts with the decision of this Court in Jenkins v Anderson, 65 LEd 2d 86 (1980). The Michigan Court of Appeals found a violation of Defendant's Fifth Amendment right to remain silent, finding no distinction between silence prior to, at the time of, or following arrest. Respondent answers that Jenkins is not controlling in the instant situation for two reasons.

First, this Court in Jenkins did not reach the issued decided by the Michigan Courts in the instant case, i.e., whether pre-arrest silence may be protected by the Fifth Amendment.

Second, this Court in Jenkins specifically noted that each jurisdiction remains free to decide whether or not to allow impeachment with prearrest silence.* It is, therefore, not the role of this Court to change the established rule in Michigan that the accused may not be questioned about his pre or post arrest silence.

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* Also, the questions here were not properly used for "impeachment" because Defendant Hurd never testified to making an exculpatory statement and never denied making an inculpatory statement.

ARGUMENT

Through his questions to Defendant as quoted above, the prosecutor obviously intended to infer that an innocent man would have gone to the police to make an exculpatory statement. This tactic has been repeatedly and consistently condemned by the Courts of the State of Michigan. The Michigan Supreme Court held in People v Bobo, 390 Mich 355, 359 (1973):

> "We will not condone conduct which directly or indirectly restricts the exercise of the constitutional right to remain silent in the face of accusation. "Nonutterances" are not statements. The fact that a witness did not make a statement may be shown only to contradict his assertion that he did."

An examination of Mr. Hurd's testimony shows that he at no time asserted that he responded to Debbie Jordan's accusation by going to the police with a statement. Under Bobo, supra at 361, the right to remain silent pertains whether the accuser is a police officer or a private citizen. Thus, the prosecutor's questioning of Defendant about his failure to make a statement at the time of the accusation falls squarely within the prohibition of Bobo. See also People v Bigge, 288 Mich 417 (1939); People v Graham, 386 Mich 452 (1971).

This is not a case, such as People v Eastway, 67 Mich App 464, 468 (1976), in which the improper reference was fleeting and inadvertent. The questioning here was clearly premediated. The prosecutor three times asked Defendant increduously why, if he knew he was innocent, he did not go to the police or to his accuser and defend himself. The innuendo-filled questions were cleverly designed to embarass Defendant into explaining why he chose silence which constitutionally he cannot be required to explain.

The Courts of Michigan have repeatedly found that deliberate violations of the Bobo rule are offensive to the maintenance

of a sound judicial system, People v Howe, 80 Mich App 258, 261-262 (1977), and cases cited therein, and therefore, cannot be harmless error. People v Robinson, 386 Mich 551 (1972). Indeed, in People v Watkins, 401 Mich 830 (1977), the Supreme Court peremptorily reversed, without inquiry into prejudice, because "it is clear from the record that the prosecutor inquired as to the defendant's silence at the time of his arrest."

In People v Wade, 93 Mich App 735 (1979), the Court of Appeals held that the constitutional right to silence is constant and applies equally to pre-arrest and post arrest silence:

> "A prosecutor many not suggest a negative inference from a defendant's pre-arrest failure to either turn himself over or to explain defenses to the police. A defendant's constitutional right to remain silent is constant, there is no distinction between silence prior to, at the time of, or following arrest."

In People v Sain, 407 Mich 412 (1979), the prosecutor used a police officer's unresponsive testimony concerning the defendant's failure to offer an explanation to the police just prior to his arrest. The Supreme Court reversed on the basis of People v Bobo, supra, even though there was no objection.

Here, the prosecution's case rested solely on the accusation by Debbie Jordan. Her testimony was somewhat suspect in that she waited until a day after the alleged incident to accuse Defendant and then did not help the police to find Mr. Hurd, even though she knew his real name, admittedly knew his telephone number (T. 102), and there is testimony that she had even been to Maurice Hurd's residence (T. 171) and therefore knew where he lived. Ms. Jordan gave the police neither Defendant's full name nor his phone number, and the authorities were unable to locate him until three or four months later (T. 115, 128). Defendant admitted being with Ms. Jordan, Spanky and Kiyo on the evening in question, but denied having touched the complainant. He testified that he and Kiyo left Spanky and Debbie in Spanky's house. They were having an argument, and Mr. Hurd and Kiyo

thought it was none of their business, so they left and did not return (T .140). In order to discredit Defendant and to attempt to offset the complainant's shaky story, the prosecutor could not resist the temptation to insinuate that Defendant should have taken it upon himself to go to both the police and his accuser with an explanation and that his failure to do so proves his guilt. In so doing, the prosecutor violated the Bobo rule and Defendant's constitutional rights. It cannot be said, given the very questionable credibility of Ms. Jordan, that the prejudicial questioning of Defendant did not have its intended effect of swaying the verdict of one or more jurors.

The Michigan Court of Appeals reversed the instant conviction on the basis of People v Bobo, supra, and People v Wade, supra, further holding:

> "Here, no cautionary instruction was requested or given. Further, the jury was confronted with the testimony of two witnesses, the complainant and the defendant, and asked to balance their credibility in a search for the truth. Although the prosecutor did not refer to defendant's answers to his questions during his closing argument, the implication was clearly given during the testimony that, if defendant was innocent, he would have gone to the police to counter the rumor that they were looking for him on a rape charge. Because the entire case hinged on the credibility of defendant and the complainant, we cannot say that, in a trial free of the error, one juror might not have voted to acquit. People v Christensen, 64 Mich App 23, 32-33; 235 NW2d 50 (1975), lv den 397 Mich 839 (1976)."
> People v Hurd, 102 Mich App 424, 431 (1980)

The People of the State of Michigan applied for rehearing in the Michigan Court of Appeals, applied for leave to appeal in the Michigan Supreme Court, and, finally, are petitioning this Court for a Writ of Certiorari, all on the basis of Jenkins v Anderson, 65 LEd 2d 86 (1980). Defendant Hurd submits that Jenkins v Anderson, supra, by its own specific language, does not apply to and certainly does not dictate a change in Michigan's

position as expressed in People v Bobo, supra; People v Wade, supra, and the instant case. This Court in Jenkins did "not consider whether or under what circumstances prearrest silence may be protected by the Fifth Amendment. We simply do not reach that issue ..." 65 L Ed 2d, fn 2, at 93. The Michigan Court of Appeals and Supreme Court did reach the issue (in Wade and in the instant case) and found that prearrest silence is protected by the Fifth Amendment. The Court in Jenkins relied on an old case, Raffel v United States, 271 US 494; 40 L Ed 1054, 46 S Ct 566 (1926), in which the Court found that the Fifth Amendment is not violated when a defendant who testifes in his own defense is impeached with his prior silence (whether prearrest or post arrest). Defendant in the instant case was not "impeached" with prior silence as he never testified that he made an exculpatory statement and never denied making an inculpatory statement. In Michigan, an accused's silence may not be used against him, in the manner in which it was used in the instant case, whether he testifies or not. People v Bobo, supra, relying on People v Bigge, 288 Mich 417 (1939). Also, "there is a serious question about the continuing validity of Raffel", Jenkins, supra, at at 97, fn. 2 (concurring opinion), and see p. 103-104 (dissenting opinion).

Furthermore, this Court in Jenkins specifically noted that each jurisdiction remains free to decide whether or not to allow impeachment with prearrest silence: "Our decision today does not force any state court to allow impeachment through the use of pre-arrest silence". 65 L Ed 2d at 96. The Michigan Court of Appeals has already declined to follow Jenkins in favor of Bobo in People v James Dixon, 99 Mich App 847 (1980). The Michigan Supreme Court is free to set constitutional standards higher than the minimum standards established by the United States Supreme Court. See, for example, People v Jackson, 391 Mich

323, 338-9 (1974).*

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* Finally, Defendant agrees with the dissent in Jenkins that the constitution "prohibits the government from imposing upon citizens any duty to present themselves to the authorities and report their own wrongdoing," that to penalize the defendant "for failing to relinquish his privilege against self-incrimination by permitting the jury to draw an adverse inference from his silence is to place an impermissible burden on his exercise of the privilege," and that the accused may not be forced to choose between the absolute right to testify in his own defense and his absolute right to refuse to incriminate himself prior to trial." 95 LEd 2d at 102-102.

CONCLUSION

For all the foregoing reasons Respondent respectfully requests this Honorable Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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Dated: August 28, 1981

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-

STATE OF MICHIGAN,

Petitioner,

-vs-

MAURICE HURD,

Respondent.

STATEMENT AS TO MAILING

I, JAMES R. NEUHARD, Defender, of the State Appellate Defender Office hereby state, pursuant to Rule 28.2, that the following papers pertaining to the above captioned cause were deposited at the United States Post Office, General Post Office, 1401 Fort Street, Detroit, Michigan, on Tuesday, August 25, 1981, within the time for filing said papers, and that the same were properly addressed to the Clerk of the United States Supreme Court, and that first class postage was prepaid.

The papers so mailed were:

a) Motion to Proceed in Forma Pauperis
b) Brief in Opposition to Petition for Writ of Certiorari
c) Affidavit
d) Proof of Service

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August 28, 1981